No. 23-40582

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HONORABLE TERRY PETTEWAY; HONORABLE DERRICK ROSE; HONORABLE PENNY POPE,
Plaintiffs-Appellees

v.

GALVESTON COUNTY, TEXAS; MARK HENRY, IN HIS OFFICIAL CAPACITY AS GALVESTON COUNTY JUDGE; DWIGHT D. SULLIVAN, IN HIS OFFICIAL CAPACITY AS GALVESTON COUNTY CLERK,
Defendants-Appellants

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

GALVESTON COUNTY, TEXAS; GALVESTON COUNTY COMMISSIONERS COURT; MARK HENRY, IN HIS OFFICIAL CAPACITY AS GALVESTON COUNTY JUDGE,
Defendants-Appellants

DICKINSON BAY AREA BRANCH NAACP; GALVESTON BRANCH NAACP; MAINLAND BRANCH NAACP; GALVESTON LULAC COUNCIL 151; EDNA COURVILLE; JOE A. COMPIAN; LEON PHILLIPS,
Plaintiffs-Appellees

v.

GALVESTON COUNTY, TEXAS; MARK HENRY, IN HIS OFFICIAL CAPACITY AS GALVESTON COUNTY JUDGE; DWIGHT D. SULLIVAN, IN HIS OFFICIAL CAPACITY AS GALVESTON COUNTY CLERK,
Defendants-Appellants

On Appeal from the United States District Court for the Southern District of Texas

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RESPONSE IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION TO STAY OF PLAINTIFFS-APPELLEES DICKINSON BAY AREA BRANCH NAACP; GALVESTON BRANCH NAACP; MAINLAND BRANCH NAACP; GALVESTON LULAC COUNCIL 151; EDNA COURVILLE; JOE A. COMPIAN; AND LEON PHILLIPS

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Defendants

1. Galveston County, Defendant-Appellant
2. Honorable Mark Henry, in his official capacity as Galveston County Judge, Defendant-Appellant
3. Dwight D. Sullivan, in his official capacity as Galveston County Clerk, Defendant-Appellant
4. Commissioner Joseph Giusti, in his official capacity as Galveston County Commissioner
5. Commissioner Darrell Apffel, in his official capacity as Galveston County Commissioner
6. Commissioner Robin Armstrong, in his official capacity as Galveston County Commissioner
7. Commissioner Stephen Holmes, in his official capacity as Galveston County Commissioner
8. Randy Ray Howry, Counsel for Commissioner Stephen Holmes
9. J. Christian Adams, Counsel for Defendants-Appellants
10. Jason Brett Torchinsky, Counsel for Defendants-Appellants
11. Maureen S. Riordan, Counsel for Defendants-Appellants
12. Robert Barron Boemer, Counsel for Defendants-Appellants
13. Shawn T Sheehy, Counsel for Defendants-Appellants
14. Angela Olalde, Counsel for Defendants-Appellants
15. Dallin Brockbank Holt, Counsel for Defendants-Appellants
16. Dalton L. Oldham, Counsel for Defendants-Appellants
17. James Edwin Trainor, III, Counsel for Defendants-Appellants
18. Jordan Raschke Elton, Counsel for Defendants-Appellants
19. Joseph M. Nixon, Counsel for Defendants-Appellants

20. Joseph R. Russo, Jr., Counsel for Defendants-Appellants

NAACP/LULAC Plaintiffs

21. Dickinson Bay Area Branch NAACP, Plaintiff-Appellee
22. Galveston Branch NAACP, Plaintiff-Appellee
23. Mainland Area Branch NAACP, Plaintiff-Appellee
24. LULAC Council 151, Plaintiff-Appellee
25. Edna Courville, Plaintiff-Appellee
26. Joe A. Compian, Plaintiff-Appellee
27. Leon Phillips, Plaintiff-Appellee
28. Richard Mancino, Counsel for Plaintiffs-Appellees
29. Diana C. Vall-llobera, Counsel for Plaintiffs-Appellees
30. Michelle Polizzano, Counsel for Plaintiffs-Appellees
31. Andrew Silberstein, Counsel for Plaintiffs-Appellees
32. Molly Zhu, Counsel for Plaintiffs-Appellees
33. Kathryn Garrett, Counsel for Plaintiffs-Appellees
34. Hilary Harris Klein, Counsel for Plaintiffs-Appellees
35. Adrianne M. Spoto, Counsel for Plaintiffs-Appellees
36. Hani Mirza, Counsel for Plaintiffs-Appellees
37. Sarah Xiyi Chen, Counsel for Plaintiffs-Appellees
38. Joaquin Gonzalez, Counsel for Plaintiffs-Appellees
39. Christina Beeler, Counsel for Plaintiffs-Appellees
40. Nickolas Anthony Spencer, Counsel for Plaintiffs-Appellees
41. Aaron E. Nathan, Counsel for Plaintiffs-Appellees

42. R. Stanton Jones, Counsel for Plaintiffs-Appellees

43. Elisabeth Theodore, Counsel for Plaintiffs-Appellees

Petteway Plaintiffs

44. Honorable Terry Petteway, Plaintiff-Appellee

45. Honorable Penny Pope, Plaintiff-Appellee

46. Constable Derreck Rose, Plaintiff-Appellee

47. Mark Gaber, Counsel for *Petteway* Plaintiffs-Appellees

48. Valencia Richardson, Counsel for *Petteway* Plaintiffs-Appellees

49. Simone Leeper, Counsel for *Petteway* Plaintiffs-Appellees

50. Alexandra Copper, Counsel for *Petteway* Plaintiffs-Appellees

51. Bernadette Reyes, Counsel for *Petteway* Plaintiffs-Appellees

52. Sonni Waknin, Counsel for *Petteway* Plaintiffs-Appellees

53. Neil Baron, Counsel for *Petteway* Plaintiffs-Appellees

54. Chad Dunn, Counsel for *Petteway* Plaintiffs-Appellees

United States of America

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December 4, 2023

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INTRODUCTION

Appellants cannot justify the extraordinary measure of a stay based solely on their desire to overturn decades of binding Circuit precedent. Their request to halt enforcement of a final judgment, affirmed by a panel of this Court, is no less than a request to abandon core principles of the rule of law—that the settled law is binding and enforceable, and that government actors cannot flagrantly violate the law with impunity.

The traditional equitable factors forbid any stay in these circumstances. An applicant's likelihood of success on appeal must be evaluated under existing law, not based upon a speculative gamble that the law might change. *See, e.g.*, *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting). At their core, Appellants' arguments are "not about the law as it exists," but "about [their] attempt to remake [Voting Rights Act] § 2 jurisprudence anew." *Allen v. Milligan*, 599 U.S. 1, 33 (2023). Appellants want this Court to cast aside longstanding en banc precedent and impose a new, unwarranted single-race burden on minority voters pursuing rights under § 2. They contend that minority voters who have proven they are suffering common racial vote dilution and are denied the opportunity to participate equally on account of *race*—not partisanship—should nonetheless be denied relief under § 2 based on a new single-race requirement premised on unjustifiable racial assumptions.

But Appellants' arguments are unmoored from the text of the Voting Rights Act, contradicted by its legislative history, and would frustrate its core purpose: to prevent unlawful dilution caused "when *minority* voters face—unlike their *majority* peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a *minority vote unequal to a vote by a nonminority voter*." *Milligan*, 599 U.S. at 25 (emphasis added). The Supreme Court recently rejected such attempts to remake § 2 law, and if this Court follows that guidance, it will do the same.

As of last week, the 2024 election is proceeding under Map 1, a plan drafted by the County itself, which the County recognizes is legally compliant. Map 1 accounts for all current incumbents. Crucially, its use will maintain the status quo for voters because it is a least-change plan based on a decades-old configuration of the commissioner precincts. By contrast, the 2021 enacted plan that Appellants desire would effectively "extinguish[] the Black and Latino communities' voice on [the] commissioners court" and "shut [them] out of the process altogether." ROA.16028. Because the enacted plan "summarily carved up and wiped off the map" the sole majority-minority precinct, ROA.16028, it was a "clear violation of § 2 of the Voting Rights Act." ROA.16029. What's more, it was a "textbook example of a racial gerrymander" enacted under "mean-spirited and egregious [circumstances] given that there was absolutely no reason to make major changes to

Precinct 3." ROA.15886, 16028-29 (internal quotation marks omitted). It would be a grave injustice to allow such an egregious, demonstrably harmful plan to proceed based on misguided speculation of overturning longstanding precedent.

In light of these facts, the trial court's remedial order was required by law when this Court lifted its administrative stay: It enforces a remedy under current, binding precedent, as determined by the trial court in its October 13, 2023 Judgment, and as a panel of this Court affirmed.

The trial court's remedial order provides crucial and definitive guidance to county election administrators, potential candidates, and voters as to which plan will be used in the 2024 election. It comes well before the statutory candidate filing deadline of December 11, 2023, TEX. ELEC. CODE § 172.023(a), and thus will facilitate the orderly administration of that election without the need for any modification to election deadlines, as Appellants acknowledged to the trial court just this morning. Entertaining yet another stay request by the County will only create more uncertainty and chaos, in addition to turning a blind eye to the County's "egregious" Voting Rights Act violation.

FACTUAL BACKGROUND

NAACP/LULAC Appellees filed this action in April of 2022, joining other challenges to the County's 2021 commissioners precinct plan. ROA.15889. Appellants filed motions to stay the matter in 2022; the trial court denied those

attempts after observing that "plaintiffs have made clear that they hope to have the Commissioners Court precinct lines redrawn in time for the 2024 election," that "any delay in reaching a final ruling . . . could impair this court's ability to issue effective relief," and thus denying a stay was necessary to "ultimately achieve a just and lawful result." ROA.890-91, 20060, 20062. The parties diligently pursued discovery and a trial date, and a ten-day bench trial commenced on August 7, 2023. ROA.15885.

On October 13, 2023, Judge Jeffrey Vincent Brown of the Southern District of Texas issued a 157-page Findings of Fact and Conclusions of Law finding the Galveston County Commissioners Court committed a "clear violation" of § 2 when it eliminated the existing ability of minority voters to elect their representative of choice by submerging every minority voter in Galveston County within Anglo-majority precincts. ROA.15887-88, 16029. This judgment was based upon a voluminous record, an intensely local appraisal of the conditions within Galveston, and a faithful application of the precedents set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Milligan*, 599 U.S. 1.

The trial court rejected Appellants' arguments that the present vote dilution was due to mere politics, not race. ROA.15938 ("[A] partisan explanation for voting patterns in Galveston County does not overcome the weighty evidence of racially polarized voting on account of race."). The Court based this determination on

substantial factual findings, including lack of minority electoral success, the extreme degree of Anglo bloc voting against minority-preferred candidates, the fact that minority candidates tend to win election in majority-minority areas, recent racial appeals in elections, lay witness accounts of racial discrimination, persistent racial disparities between minorities as compared to Anglos, and "overwhelming[]" racial polarization in primary participation. ROA.16019. The trial court found it "stunning how completely the county extinguished the Black and Latino communities' voice on its commissioners court during 2021 redistricting," which resulted in Black and Latino voters "being shut out of the process altogether." ROA.16028.

In addition to finding the enacted plan "illegally dilutes the voting power of Galveston County's Black and Latino voters by dismantling Precinct 3," ROA.15887, the court also credited testimony that the 2021 plan was "a textbook example of a racial gerrymander" that "summarily carved up and wiped off the map" Precinct 3, and that Appellants' actions were "mean-spirited and egregious given that there was absolutely no reason to make major changes to [the majority-minority] Precinct 3." ROA.15885-86, 16028-29 (internal quotation marks omitted). The district court thus reached the "grave conclusion" that it "must enjoin" future use of the map. ROA.15886.

Appellants appealed this judgment and moved in district court for an emergency stay pending appeal, which the court denied after finding Defendants

"established none" of the stay factors. ROA.16066. Appellants then filed a motion for emergency stay pending appeal and for a temporary administrative stay with this Court. Dkt. 13 at 6. This Court expedited the appeal, set oral argument for November 7, and issued a series of administrative stays through November 10. Dkts. 28-2, 40-1. NAACP/LULAC Appellees opposed the requested stay in their Appellee Brief. Dkt. 69 at 48-53.

On November 10, 2023, the Fifth Circuit affirmed, ruling that the district court "did not clearly err" in applying the *Gingles* test and that it "appropriately applied precedent when it permitted the black and Hispanic populations of Galveston County to be aggregated for purposes of assessing compliance with Section 2." Dkt. 118-1 at 5. But despite having agreed that the district court properly applied the law, the panel summarily extended the administrative stay pending en banc polling. Dkt. 122-2. On November 28, 2023, the Fifth Circuit granted en banc review, vacated the panel decision pursuant to Fifth Circuit Rule 41.3, and set oral argument for May 2024. Dkt. 136.

On November 30, 2023, this Court clarified that the "administrative stay imposed terminated when the court granted rehearing en banc." Dkt. 145-2. Thereafter, the trial court granted Appellees' joint request that it enforce the unstayed judgment permanently enjoining use of the enacted plan, and ordered a remedial plan for the 2024 election. *Petteway v. Galveston County*, Consolidated

No. 3:22-CV-57, Dkt. 267 (S.D. Tex. Nov. 30, 2023). The trial court found it was "no longer practicable to permit the commissioners court the opportunity to cure its enjoined map's infirmities" as originally provided for, and that it was forced to order the use of the County's Map Proposal 1. *Id.* at 2-3. The trial court set a status conference for Monday, December 4, 2023, at 10 a.m. CT. On December 1, 2023, Appellants filed their Renewed Emergency Motion to Stay Pending Appeal.

ARGUMENT

I. Any Stay at this Juncture Would Contravene Principles of Judicial Administration and the Rule of Law.

If this Court grants a stay, it would set a dangerous precedent that government actors may violate longstanding precedent with impunity based upon a gamble they can change law. In this way, Appellants' request contravenes core principles of judicial administration and the rule of law that provide the backbone to our judicial system. It must be clear to government actors they have an obligation to follow final judicial determinations based upon the law as it is, and they may not ignore such determinations merely because the law is not as they wish it to be.

"A stay is an 'intrusion into the ordinary processes of administration and judicial review'" meant to allow appellate courts to "responsibly fulfill their role in the judicial process." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). A stay of a lower court order is an "extraordinary remedy," *id.* at 437 (Kennedy, J., concurring);

thus, courts may not "reflexively hold[] a final order in abeyance pending review" without weighing the equitable factors. *Id.* at 427. This limitation furthers important values of judicial administration, public policy, and the rule of law, allowing for the "prompt execution" of lawful orders. *Id.*

The traditional stay analysis requires consideration of four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (internal quotation omitted). "The party requesting a stay bears the burden of showing that the circumstances justify" that stay. *Id.* at 433–34. None of these factors weigh in favor of a stay here.

Here, Appellants' entire basis for a stay rests on whether this Court will take the unusual step of overturning three decades of en banc precedent recognizing that § 2 claims can be brought by individuals from more than one racial minority background who experience common racial vote dilution. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) (recognizing a minority group comprising Black and Latino voters for *Gingles* analysis); *see also Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989); *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989); *Campos v. Baytown*,

840 F.2d 1240, 1244 (5th Cir. 1988)*; LULAC Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1499-1502 (5th Cir. 1987), *opinion vacated on reh'g on other grounds*, 829 F.2d 546 (5th Cir. 1987). Both the trial court and a panel of this Court agree the judgment faithfully applied existing law. The remedial order is required under current law—a plan that does not dilute Black and Latino voting power—and one drafted and proposed by the County Defendants.

The practical effect of any stay at this juncture is to severely narrow the likelihood Plaintiffs will have an equal opportunity to elect their chosen representative in the 2024 election. Thus, granting Appellants' motion would impermissibly "resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review," effectively granting Appellants the ultimate relief they request without any change in the current law. *Nken*, 556 U.S. at 427. It would therefore obstruct the enforcement of a judgment under current law, a lapse in judicial administration that undermines core principles of the rule of law. Appellants' Motion should be denied on these grounds alone.

II. Appellants Are Not Likely to Succeed on the Merits.

It is undisputed that binding en banc circuit precedent required affirmance of the judgment. Dkt. 118-1 at 3. A party with no right to relief under existing law is not likely to succeed on the merits and therefore not entitled to a stay pending appeal. "[A] determination regarding an applicant's likelihood of success must be made

under 'existing law.'" *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting) (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) (Roberts, C.J., dissenting)). Further, "[t]he principles and policies of *stare decisis* operate with full force where, as here, the en banc court is considering overturning its own en banc precedent." *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1282 (Fed. Cir. 2014) (en banc), *abrogated on other grounds by Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015); *see also*, *Riccio v. Sentry Credit, Inc.*, 954 F.3d 582, 591 (3d Cir. 2020) (en banc) ("[P]rior en banc decisions carry more stare decisis weight than prior panel decisions."); *McKinney v. Pate*, 20 F.3d 1550, 1565 n.21 (11th Cir. 1994) (en banc) ("[T]he implications of *stare decisis* [when considering a panel decision] are less weighty than if we were overturning a precedent established by the court en banc.").

To hold that Appellants are likely to succeed on the merits despite their position being clearly foreclosed under en banc precedent would pervert the likelihood-of-success analysis. *Stare decisis*, and indeed the premise of a rule of law, requires a "presumption" that the law will not change every time the composition of a court changes, *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (overturned on other grounds); to instead assume that it is *likely* an en banc court will reverse its own en banc precedent would stand that presumption on its head. *Cf. Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) ("*Stare*

decisis . . . is a foundation stone of the rule of law[, . . . and] is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.") (internal quotations omitted).

Like the doctrine of *stare decisis*, requiring a stay applicant to demonstrate a likelihood of success under existing law "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation," *Id.*—and, what's more, saves courts from the need to confront novel challenges to settled law in an emergency posture, without the benefit of full briefing, argument, and adequate time to deliberate. *Cf. Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (emergency motions are disfavored for considering difficult merits questions because they require decision on a "short fuse without benefit of full briefing and oral argument").

Appellants attempt to circumvent this dispositive hurdle by arguing the question before this Court merits a stay because it "presents a serious legal question." Mot. at 6. Undoubtedly the issue before the Court has a practical impact, but it cannot be considered a serious legal question when it is already resolved by longstanding precedent. In this way, the posture here is easily distinguished from the cases Appellants' rely upon (at p. 6), which both involved *novel* questions of law. *See United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983) ("[W]e have

been cited to no definite ruling that would guide us in this case."); *Campaign For S. Equal. v. Bryant*, 773 F.3d 55, 58 (5th Cir. 2014) (noting only what other circuits held on the issue, while warning against "a disruption . . . from a lack of continuity and stability" in the law).

Furthermore, this Court's previous decisions recognizing that an injured minority group in a jurisdiction can include individuals of more than one racial minority background are grounded in the text, structure, history, and purpose of the statute, and accord with the weight of authority around the country. *See, e.g.*, *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 273, 278 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994); *Badillo v. Stockton*, 956 F.2d 884, 891 (9th Cir. 1992); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990).

The textual linchpin of a § 2 effects claim is that a given practice or procedure "results in a denial or abridgement of the right . . . to vote *on account of race* . . . ." to a "class of citizens." 52 U.S.C. § 10301(a), (b) (emphasis added). A "class" means "[a] group of people . . . that have common characteristics or attributes," Black's Law Dictionary (11th Ed. 2019). Here, a "class of citizens protected by subsection (a)" is a group of voters subject to suffering racial vote dilution in a given jurisdiction, 52 U.S.C. § 10301(b), much like a "class" in any class action. Minority voters in a particular jurisdiction can be said to suffer such dilution as much for *not*

belonging to a majority group (e.g., for being a class of nonwhite citizens) as for belonging to one specific census-defined minority group. *See, e.g.*, *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 198 (1973) (holding that Black and Hispanic students "suffer[ed] identical discrimination in treatment when compared with the treatment afforded Anglo students"); *see also United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 150 n.5 (1977) (classifying Puerto Rican and Black citizens as a minority group and using the term "nonwhite" collectively).[1]

As this case demonstrates, statutory text and Supreme Court precedent effectively guide courts in identifying when minority voters suffer unlawful *racial* vote dilution as opposed to mere political defeat. After an intensely local application of the § 2 framework, the district court found that "Black and Latino voters in Galveston County have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," ROA.16029 (quotation marks omitted), a finding the appellate court affirmed. This was substantiated by findings of *racially* polarized voting specifically establishing racial, not political, polarization within the County. *See, e.g.,* ROA.16019-28.

[1] For this reason, imposing a single-minority requirement in vote dilution cases would create incongruity with time, place, and manner claims, where minority voters experiencing a common discriminatory practice bring common claims under § 2. *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 264-65 (5th Cir. 2016) (en banc); *cf. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339 (2021) (considering the size of disparate impacts on multiple minority groups).

Moreover, it is the individual Black and/or Latino voters who suffer the dilution on account of their race. *See, e.g.*, *Milligan*, 599 U.S at 36. An artificial single-race threshold test for vote dilution claims would require courts themselves to make unjustifiable race-based assumptions about those individuals regardless of what an intensely local appraisal of the facts show. For example, voters in a community where Japanese-Americans and Pakistani-Americans together make up 50+% of a potential district could invoke § 2 because they happen to fall under the common census classification "Asian," but Black and Latino voters similarly situated could not—regardless of jurisdiction-specific facts, including experiences of discrimination and whether majority voters as a factual matter prevent them from electing common candidates of choice. Whether minority voters belong to one census-defined group or two, courts do not make race-based assumptions of cohesion; voters must still prove (as Appellees did here) they are cohesive in expressing a "distinctive minority vote" that is thwarted "at least plausibly on account of race." *Milligan*, 599 U.S. at 28 (internal quotation marks omitted).

As the facts here also show, recognizing minority coalition claims does not present the administrability or structural problems of crossover-districts (when a minority group relies on crossover votes from the majority group). As the Supreme Court itself recognized in *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (Kennedy, J., Roberts, C.J., Alito, J., lead op.), "[u]nlike any of the standards proposed to allow

crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do *minorities* make up more than 50 percent of the voting-age population in the relevant geographic area" (emphasis added). This threshold was examined and met in Galveston. And unlike with crossover districts, here there is no "serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates." *Id.* at 16. Even Appellants' expert did not dispute that Anglo bloc voting would defeat the minority candidate of choice "in every election in every commissioners precinct" of the enacted plan. ROA.15932.

None of Appellants' arguments warrant the drastic change in Circuit precedent they desire, much less the extraordinary stay they request. As matters stand today—under current, binding law—the enacted map is indisputably unlawful, and the district court's judgment is correct. That judgment must be enforced.

III. The Remedial Map Is Required Because Plaintiffs Would Likely Prevail on their Alternative Claims.

After concluding that Appellants violated § 2, the district court found it unnecessary to decide Appellees' intentional discrimination or racial gerrymandering claims. *See* ROA.16032-33. But the court's detailed factual findings make it abundantly clear that the enacted plan would be struck down on these constitutional grounds upon remand. As a panel of this Court held, the district made no clear error in its factual findings, and the panel did not request en banc review of those findings. *See* Dkt. 118-1 at 5.

First, the district court's findings establish that the enacted plan was adopted with a discriminatory purpose and has discriminatory effects. The commissioners court "summarily carved up and wiped off the map" the historic majority-minority commissioners Precinct 3 in a "mean-spirited" and "egregious" manner despite "absolutely no reason to make major changes to Precinct 3." ROA.16028-29. In adopting this plan, Appellants caused "an evident and foreseeable impact on racial minorities in Galveston County by eliminating the sole majority-minority precinct . . . depriving them of the only commissioners precinct where minority voters could elect a candidate of their choice." ROA.15939.

Evidence of the map-drawing process reinforced the intentional nature of Appellants' conduct in dismantling the sole majority-minority precinct. The enacted plan follows the specific designs of County Judge Henry, ROA.15954, 15956, 15958, who "underst[ood] that Galveston County's Black and Latino population was centered around Precinct 3" and then intentionally demolished that precinct. ROA.15953. The district court determined there was no credible alternative motivation for the discriminatory impact of the plan: commissioners disclaimed partisan intent, and their purported alternative objectives did "not explain its obliteration of benchmark Precinct 3." ROA.15957, 15977-82. These findings establish "a clear pattern, unexplainable on grounds other than race," making the "evidentiary inquiry . . . relatively easy." *Vill. of Arlington Heights v. Metro. Hous.*

Dev. Corp., 429 U.S. 252, 266 (1977). There is a "strong inference" that the enacted plan's adverse effects were desired because they were an inevitable result of a government's chosen action, but otherwise avoidable. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 & n.25 (1979).

The district court's factual findings also support the conclusion that race predominated in the design of the enacted plan. The district court credited expert testimony that the commissioners court executed a "textbook example of a racial gerrymander" that was "egregious," ROA.15885-86, providing "strong circumstantial evidence" of racial gerrymandering under applicable law. *Thomas v. Bryant*, 938 F.3d 134, 158 n.119 (5th Cir. 2019). Plaintiffs' alternative maps that "perform as well or better than the enacted plan under the disclosed criteria," ROA.15979, prove that race, and not some other objective, predominated in the enacted plan's design. *Cooper v. Harris*, 581 U.S. 285, 317 (2017) (alternative plans "can serve as key evidence in a race-versus-politics dispute" and present a "highly persuasive way to disprove" a defendant's purported goals caused the design). Since Appellants have offered no explanation for their use of race as a predominating factor, the enacted map cannot survive strict scrutiny.

IV. Appellants Will Not Suffer Irreparable Harm Absent a Stay.

Appellants will not suffer irreparable harm if the final judgment here is enforced and the 2024 election for Precincts 1 and 3 proceeds under Map 1. A

majority of the commissioners court expressed an initial preference for Map 1. ROA.15958. And both the county's redistricting counsel and Judge Mark Henry testified that Map 1 would be legally compliant. ROA.15912-13, 15961. Appellants themselves argued that Commissioner Giusti and Judge Henry would have voted for Map 1 had Commissioner Holmes asked. ROA.15387-88. They cannot now contend Map 1 is no longer a viable alternative.

There is also ample time for candidates to file before the December 11 deadline. This morning, Appellants acknowledged to the trial court that they saw no need for any extension of the candidate filing deadline to implement Map 1.

The political harm Appellants complain of from Map 1 relates to the *personal* political preferences of certain commissioners—not to a government entity—and nevertheless could have been ameliorated by commissioners proposing one of the countless alternative plans available to them over the several weeks since judgment issued. Appellants certainly had sufficient time to do so considering they required their own demographer to draw the enacted plan "in just eight days." ROA.16067 (denying motion for stay pending appeal). As was established at trial, a "multitude" of alternative plans could preserve a majority-minority precinct while achieving their purported objectives. ROA.15920, 15979. They could even have accounted for the residency of the unnamed candidates they now express concern for. *See* Mot. at 18. But Appellants chose not to prepare an alternative, even after a panel of this Court

affirmed the Judgment on November 10, 2023. Any complaint they have about Map 1 is due to inaction and cannot be attributed to the district court's enforcement of a valid judgment.

V. Plaintiffs Are Certain to Suffer Irreparable Harm if the Enacted Plan Is Used in 2024, and the Public Interest Does Not Support a Stay.

The various temporary administrative stays since the original judgment created significant uncertainty in Galveston County as to what map would be used to administer the 2024 election for commissioner Precincts 1 and 3. The trial court's remedial order provides definitive guidance to as to which plan will be used in the 2024 election. It issued well before the statutory candidate filing deadline of December 11, 2023, TEX. ELEC. CODE § 172.023(a), and thus will facilitate the orderly administration of the election without the need for any modification to election deadlines. In this way, the trial court's order unambiguously serves the "bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled." *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring).

Appellants' motion, if granted, would not only disturb this crucial clarity, but would open the door to irreparable harm for Galveston's voters. There is no dispute that the enacted plan "disproportionately affects Galveston County's minority voters by depriving them of the *only* commissioners precinct where minority voters could elect a candidate of their choice." ROA.15939 (emphasis added). Appellants'

assertion that a stay would preserve the status quo is therefore wrong. There has never been an election for the commissioner of Precinct 3 under the enacted plan.[2] If the 2024 elections are permitted to proceed under the enacted plan, and the new commissioner for Precinct 3 elected under this plan, the status quo will actually *change* to the severe detriment of the minority community: it will be effectively "shut out" from chosen representation on commissioners court. ROA.16028. The dramatic change from the benchmark Precinct 3, in effect for well over a decade, to the enacted plan also risks significant voter confusion, as the likelihood of "voters not knowing in which commissioner's precinct they reside . . . is high." ROA.15981-82.

The denial of equal voting power is a severe restriction on the right to vote, and "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (citing *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986)). "[O]nce the election occurs, there can be no do-over and no redress" for citizens whose voting rights were violated: "The injury to these voters is real and completely irreparable" if the election is held under the enacted plan. *League of Women Voters of N.C.*, 769 F.3d at 247.

[2] The 2022 elections included only Precincts 2 and 4, in which the sitting commissioners (Commissioners Armstrong and Giusti) retained their seats.

Likewise, "the public interest is best served by ensuring not simply that more voters have a chance to vote but ensuring that all citizens of [the] County have an equal opportunity to elect the representatives of their choice." *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1348-49 (N.D. Ga. 2015). Moreover, "[i]t is clear that it would not be equitable or in the public's interest to allow the [County] . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (third alteration in original) (quoting *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011)). Allowing the enacted plan to be used in 2024 would deny a most basic and fundamental right to thousands of Galveston's voters, and thus the public interest and the risk of irreparable harm to interested parties weigh heavily against a stay.

Congress amended the Voting Rights Act to add § 2's effects test in order to further the Act's core purpose of ending discriminating in voting—without requiring courts to reach the "unnecessarily divisive" issue of intent. *See Gingles,* 478 U.S. at 71 (plurality opinion). Any stay of the lower court's judgment and remedial order, which faithfully applied binding precedent to enjoin the enacted plan and provides the remedy due under law, frustrates that core purpose and is antithetical to concepts of stare decisis and the rule of law.

CONCLUSION

For the reasons set forth above, Appellants' Renewed emergency Motion to Stay Pending Appeal should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on December 4, 2023, this brief was served on counsel for all parties via the ECF system. I further certify that all parties required to be served have been served.

s/ Hilary Harris Klein

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief contains 5,165 words, as determined by the word-count function of Microsoft Word 2016, and was prepared in a proportionally spaced 14-point Times New Roman font.

s/ Hilary Harris Klein